Opinion of the United States Court of Appeals for the Fifth Circuit.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18475

IN THE MATTER

of

TMT TRAILER FERRY, INC., Debtor, ARTHUR H. SHAFFER and M. JAMES SPITZER, Trustees; THE PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.,

Appellants,

versus

C. GORDON ANDERSON, as Trustee in Reorganization,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(July 7, 1961.)

Before TUTTLE, Chief Judge, and CAMERON and JONES, Circuit Judges.

TUTTLE, Chief Judge: This appeal tests the correctness of the order of the trial court, sitting as a bankruptcy court in a Section X reorganization proceeding,

setting aside its previous order confirming a plan of reorganization. The answer depends upon the answer to the question: When is a plan of reorganization so far "consummated" as to deprive a trial court of its power to modify it or set it aside?

The tortuous trial of this litigation makes the present problem of the Court appear much more difficult than it really is. The history necessary for a determination of the issues before us can be relatively simply stated.

An involuntary petition under Chapter X of the Bankruptcy Act was filed June 27, 1957. The debtor initially opposed the petition and the Court permitted the debtor to operate its business while it tried to solve its financial problems. The debtor's efforts were not successful, so on November 15, 1957, it filed its petition consenting to reorganization. On November 18th an order was entered for reorganization and trustees were appointed. The trustees had no cash and the business was not being operated. However, they borrowed some money and started moving freight in the three barges owned by the company and covered by a first preferred ship mortgage held by one Caplan, a predecessor of the appellants, Shaffer and Spitzer, as trustees for a group of mortgagees. A fourth vessel was chartered under circumstances that turned out to be profitable. Throughout the first several months of such operation the Caplan mortgage interests opposed the efforts of the trustees and they continually sought leave to foreclose their mortgage. The amount of the mortgage claim was $330,000.00. The refusal of the trial court to grant them permission to foreclose resulted in the first appeal to this Court. Our decision in that case, *Caplan* v. *Anderson, Trustee, etc.;* 5 Cir., 256 F. 2d 416, directed that "unless immediate and satisfactory provision is made for the protection and satisfaction of [the mortgage] debt, or clear showing is made that [the mort-

gagee's] rights will not be affected by further delay," the trial court must permit a foreclosure of the mortgage.

Upon remand the trustee continued to operate the company in a manner that began to produce a substantial profit. The trial court began proceedings to marshal the liens against the vessels, and the trustees, after much discussion among the many secured and unsecured creditors, who asserted claims of some ten million dollars against the company, proposed a plan of reorganization. Under this plan the Caplan mortgage group was to surrender its mortgage liens on the vessels and were to receive all of the shares of common stock, 250,000 shares of convertible preferred stock, and one vessel free and clear together with some cash earned during the operation. The unsecured creditors were to receive 17½% of their claims in convertible preferred stock. Other maritime lien claimants against the vessel were to receive cash and preferred stock. The Caplan group was to elect six of the nine members of the board of directors and the unsecured creditors were to elect three members.

During the pendency of the proposal to adopt this plan, the trial court, on February 24, 1959, without a hearing called for that purpose, but based on documents and records of file, made a finding of insolvency as of July 25, 1958. This was coupled with a finding that the original stockholders of the corporation had no further interest in the reorganization. There were a large number of common stockholders, many of whom had purchased their stock from persons later found to have been associated to some extent with the Caplan mortgage group. A relatively small number of these stockholders were represented in the proceedings by a stockholders committee.

With the consent of all parties other than the stockholders committee, the United States as a tax creditor,

and the Securities & Exchange Commission, which intervened by reason of the provisions of Section 208 of Chapter X of the Bankruptcy Act,[1] the trial court confirmed the plan of reorganization on March 9, 1959. The stockholders committee and the United States appealed from this order of confirmation. The appeal of the United States was later voluntarily dismissed. The appeal was not prosecuted to a conclusion but has now been consolidated with the appeal that is now being considered. The earlier appeal was predicated on the failure of the trial court to order the trustee to conduct an investigation under Section 167 of the Bankruptcy Act, and on a failure of the court to conduct a hearing on insolvency of the debtor and to make findings of its assets and prospective earnings.

The objection of the Securities and Exchange Commission to the confirmation was also based on the failure of the trial court to order the trustee to conduct an investigation under Section 167 prior to confirming the reorganization plan. Pending the appeal from the confirmation of the plan no steps were taken towards its consummation. In the meantime the trustees continued to operate the company on an increasingly profitable basis. On December 31, 1959, Caplan filed a petition for leave to consummate the plan of reorganization, asserting

---

[1] "§ 608. Intervention of Securities and Exchange Commission. The Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file a notice of its appearance in a proceeding under this chapter. Upon the filing of such a notice, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding, and shall be deemed to have intervened in respect of all matters in such proceeding with the same force and effect as if a petition for that purpose had been allowed by the judge; but the Commission may not appeal or file any petition for appeal in any such proceeding." 11 U.S.C.A. § 608.

that no supersedeas had been taken during the appeal of the stockholders committee. On January 8, 1960, the trustee filed a similar petition, and on the same day the Securities & Exchange Commission filed its objections to the consummation of the reorganization plan. It also filed a petition on the same day requesting an investigation, and attached an affidavit of its financial analyst, setting forth the results of an investigation, which disclosed that participants in the Caplan mortgage, or persons associated with them, had had extensive dealings in TMT stock. The Securities and Exchange Commission expressed a strong opinion that an investigation would disclose that the reorganization plan would be unfair in turning the corporation over to persons, or close associates of persons, who had dealt extensively in the stock of the company in transactions which the S.E.C. asserted were of questionable legality. The position of the S.E.C. was shared by Tri-Continental Financial Corporation, a creditor with a claim of more than $800,000. This company, although having formerly approved the plan, now opposed the order of consummation. These objections came on for a hearing and all parties, including the appellant here, the Caplan group, agreed that an investigation should be made. Thereupon the court entered its order for investigation under Section 167 of the Bankruptcy Act.

The trustee made a thorough investigation which disclosed numerous transactions between members of the Caplan group and one Abrams, who had obtained and sold many shares of TMT stock without compliance with the requirements for registration with the SEC. The report showed that some of the mortgagees received stock in addition to an obligation to pay approximately 15% interest on the mortgage debt. Other facts were asserted in the report of investigation, including a suggestion that

there were possible defenses to the Caplan mortgage. Thereupon, the trustee, changing his position, strongly opposed an order of consummation and urged that the court enter an order setting aside the plan of reorganization and permitting the trustee to seek appropriate relief with respect to the Caplan claim. In response to an invitation from the court, all parties except the Caplan mortgage interests either approved or acquiesced in the trustee's recommendations. Thereupon, the trial court, having determined that nothing had been done to consummate the plan, and finding that certain facts touching on the fairness of the plan had not been known to the creditors and to the court at the time of the order of confirmation, entered its order setting aside the March 9, 1959 order of confirmation, and directed the trustee to proceed as he saw fit to contest the Caplan mortgage. It is this order setting aside the order of confirmation that is here appealed from.

Touching first on the original appeal by the stockholders committee from the order of confirmation, we note that the Caplan group contends that the committee had no standing to appeal because a prior order of insolvency and determination that the stockholders had no equity stood unappealed from and was thus binding.[2]

We do not need to determine this question, however, because in our opinion the later action of the trial court in itself setting aside the order of confirmation rendered the prior appeal moot.

We thus come to the later appeal taken by the Caplan-Spitzer-Shaffer group. These parties originally appeared in the litigation determinedly seeking the right to an immediate foreclosure of their mortgage. They now appear

---

[2] Such an interlocutory order is appealable in Bankruptcy. see 11 U.S.C.A. 47, 48.

here just as determined to maintain the position which the plan of reorganization gave them, i.e., as owners of the entire voting stock and of substantial convertible preferred stock and with no mortgage on the reorganized company's barges or ships. They no longer wish an immediate foreclosure, which is understandable in view of the fact that the trustees' operation of the debtor company has demonstrated the company's ability to earn annual net operating profits before income taxes of more than $200,000.

The main thrust of appellants' argument that the trial court did not have the power to set aside its order of confirmation is twofold. First, all the creditors agreed to the reorganizaion plan; it therefore became a compromise settlement which is binding on all; second, in any event the trial court could not set aside the order of confirmation because rights had vested under it. There is the subsidiary argument that the parties should be barred by laches and delay in seeking to upset the earlier order.

On the other hand, all the parties to the reorganization, the trustees, the principal unsecured creditors, the stockholders committee, and the S.E.C., contend that there could be no "settlement" until the reorganization had become consummated and that no consummation had occurred because no steps had been taken to put it into effect.

We conclude that the latter view is the correct one.

Appellants' contention that the acceptance of the reorganization plan by all the affected parties except the common stockholders amounted to a legally binding compromise independently of the final conclusive effect of the court's order upon consummation seems unsupported in law. It is true that the requisite acceptances of the reorganization plan were filed with the court. Appellants contend that this amounted to a compromise that was final and binding when the order of confirmation was entered by the court. They

cite only three bankruptcy court cases in support of this proposition: In Re Orinoco Corp., 269 Fed. 344, cert. den. 256 U. S. 694; In Re Sobod, 25 F. Supp. 344, aff'd. 103 F. 2d 1019, and In Re Chatham Jewelers, 108 F. Supp. 385. None of these cases supports the proposition advanced by the appellants. In the first place, none of them deals with a Chapter X Reorganization as to which the bankruptcy laws contemplate a great deal of flexibility in the proceedings before the trial court. *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144. Moreover, in the Orinoco case the court expressly found that the settlement had already been carried out and that there was no way in which one party could be made whole if the compromise were set aside. In the other two cases the District Court merely held that in a claim compromise approved in an ordinary bankruptcy, the trustee could have specific performance in a summary proceeding.

We conclude that whatever acceptances of the plan of reorganization were given by the several parties, they were given under the specific provisions of Chapter X, and the parties did not intend to enter into or be bound by any compromise except to the extent that a final binding consummation of the plan would be a compromise.

Chapter X itself contemplates the entry by the trial court of a final decree in consummation of the plan. 11 U.S.C.A. 628. Moreover, Section 629 specifies what acts are deemed to consummate a plan.[1] As will be noted, this section pro-

---

[1] "§ 629. Acts deemed consummating plan; order declaring consummation; substantial alteration or modification

(a) A plan shall be deemed to have been substantially consummated if, insofar as applicable, each of the following events has occurred:

(1) transfer, sale or other disposition of all or substantially all of the property dealt with by the plan pursuant to the provisions of the plan;

vides that *after a plan has been substantially consummated as defined,* "the plan may not thereafter be altered or modified . . ." By clearest implication this should indicate that until there is substantial consummation the plan is subject to modification for proper cause shown.

We think the true rule is that unless there has been such consummation that a modification would unfairly affect the complaining party he cannot successfully resist a decision by the trial court for good cause shown to withdraw its prior approval. This is consistent with the language of the Supreme Court in *Pfister* v. *Northern Illinois Finance Corp., supra,* at page 152:

> "Courts of bankruptcy are courts of equity without terms . . . The entire process of rehabilitation, reorganization or liquidation is open to reexamination out of time by the District Court, in its discretion, and subject to intervening rights."

---

(2) assumption of operation of the business and management of all or substantially all of the property dealt with by the plan by the debtor or by the corporation used for the purpose of carrying out the plan; and

(3) commencement of the distribution to creditors and stockholders, affected by the plan, of the cash and securities specified in the plan as provided for in section 624 of this title.

(b) Upon notice to the trustee, the debtor, the Securities and Exchange Commission and such other persons as the judge may designate, the trustee, the debtor in possession, the corporation to which the assets of the debtor are to be transferred under the plan, or any other party in interest may apply to the judge for an order declaring the plan to have been substantially consummated under the provisions of subdivision (a) of this section.

(c) When a plan has been substantially consummated as defined in subdivision (a) of this section, or an order has been entered under subdivision b of this section, the plan may not thereafter be altered or modified if the proposed alteration or modification materially and adversely affects the participation provided for any class of creditors or stockholders by the plan."

11 U.S.C.A. § 629.

Here no intervening rights had accrued. None of the actions described in Section 629 had been done. The appellants claim they were prejudiced because they voluntarily dismissed a second appeal from an order of the trial court refusing them the right to an immediate foreclosure. But the order they are now appealing from is in no way related to such a right. Any action which they voluntarily took in order to place themselves in a position to work with the debtor's trustee and the other creditors in an effort to devise a satisfactory plan of reorganization necessarily involved the risk that such a plan might not be confirmed, or if confirmed, that it might subsequently be modified to the extent permitted by law.

There is no merit in the contention that the trustee for the debtor and the other parties should be barred to urge the court to revoke the order of confirmation because of laches. The trustee was a court officer. His duties are a part of judicial administration. The rights of the parties he represents may not lightly be prejudiced because the administration of the debtor's affairs under court supervision was somewhat delayed. We think sufficient showing was made to warrant the court's decision that its earlier order of confirmation was not for the best interests of the parties and we think that neither the court nor its officer is barred by laches from proceeding with a proper administration of the debtor's affairs. Of course, proper administration comprehends as prompt disposition of the Chapter X proceedings as is reasonably possible.

Appellants additionally complain of the entry of several orders involving the sale of a damaged vessel, the purchase of a new one, authorizing its very substantial alteration, and the leasing of dock facilities. They appealed from each of the orders. In no case was a supersedeas sought or granted. It was the duty of the trustee in reorganization to maintain the going-concern value of the debtor.

Collier, 14th ed., Vol. 6, p. 3446. See also, Remington, 1961 ed., Vol. II, pp. 212-213, where it is said:

> "An order authorizing a trustee or debtor in possession to continue the debtor's business impliedly authorizes the making of customary expenditures and the incurring of obligations in the ordinary courses of business, including buying on credit, without special order."

Appellants fail to show how their position as mortgage holders has been in any way jeopardized by the orders complained of. We think, therefore, that no basis for reversal of the administrative orders is shown.

The orders of the trial court appealed from by Shaffer and Spitzer, trustees, are AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals,
Fifth Circuit.

By CLARA R. JAMES,
Deputy

New Orleans, Louisiana

OCT. 23, 1961

Judgment.

Extract from the Minutes of July 7, 1961.

IN THE MATTER

of

TMT TRAILER FERRY, INC., Debtor, ARTHUR H. SHAFFER and M. JAMES SPITZER, Trustees; THE PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.; UNITED STATES OF AMERICA,

No. 18475 *versus*

C. GORDON ANDERSON, as Trustee in Reorganization.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the orders of the trial court appealed from by Shaffer and Spitzer, trustees, in this cause be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellants, Arthur H. Shaffer and M. James Spitzer, Trustees, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Order Denying Rehearing.

[455]

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 18,475

In the Matter of

TMT TRAILER FERRY, INC., Debtor, ARTHUR H. SHAFFER and M. JAMES SPITZER, Trustees; THE PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.; UNITED STATES OF AMERICA,

Appellants,

v.

C. GORDON ANDERSON, as Trustee in Reorganization,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(August 18, 1961)

ON PETITION FOR REHEARING

Before: TUTTLE, Chief Judge, CAMERON and JONES, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

Text of Statutes Involved.

Sec. 27*. (11 U.S.C. § 50.) Compromises

The receiver or trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate.

Sec. 222. (11 U.S.C. § 622.) Alteration or Modification of Plan

A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

• • •

Sec 224. (11 U.S.C. § 624.) Effect of Confirmation

Upon confirmation of a plan—

(1) the plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all

* Section 102 (11 U.S.C. § 502) makes Section 27 applicable to proceedings under Chapter X.

creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable;

(2) the debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor or such other corporation;

(3) if the judge shall so direct, there shall be deposited and distributed, in such manner as the judge may direct, the moneys for all payments which by the provisions of the plan or under this chapter are required to be made in cash; and

(4) distribution shall be made, in accordance with the provisions of the plan, to creditors and stockholders (a) proofs of whose claims or stock have been filed prior to the date fixed by the judge and are allowed, or (b) if not so filed, whose claims or stock have been listed by the trustee or scheduled by the debtor in possession and are not contingent, unliquidated or disputed.

• • •

Sec. 228. (11 U.S.C. § 628.) Final Decree on Consummation of Plan

Upon the consummation of the plan, the judge shall enter a final decree—

(1) discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders

of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;

(2) discharging the trustee, if any;

(3) making such provisions by way of injunction or otherwise as may be equitable; and

(4) closing the estate.

• • • • •

Sec. 229. (11 U.S.C. § 629.)

a. A plan shall be deemed to have been substantially consummated if, insofar as applicable, each of the following events has occurred:

(1) transfer, sale or other disposition of all or substantially all of the property dealt with by the plan pursuant to the provisions of the plan;

(2) assumption of operation of the business and management of all or substantially all of the property dealt with by the plan by the debtor or by the corporation used for the purpose of carrying out the plan; and

(3) commencement of the distribution to creditors and stockholders, affected by the plan, of the cash and securities specified in the plan as provided for in section 224 of this Act.

b. Upon notice to the trustee, the debtor, the Securities and Exchange Commission and such other persons as the judge may designate, the trustee, the debtor in possession, the corporation to which the assets of the debtor are to be transferred under the plan, or any other party in interest may apply to the judge for an order declaring the plan to have been substantially consummated under the provisions of subdivision a of this section.

c. When a plan has been substantially consummated as defined in subdivision a of this section, or an order has been entered under subdivision b of this section, the plan may not thereafter be altered or modified if the proposed alteration or modification materially and adversely affects the participation provided for any class of creditors or stockholders by the plan.

Order Appointing Special Master.

This cause came on for hearing before the court pursuant to notice to interested parties on January 27, 1961 on the Petition of the Trustee for the appointment of a Special Master to consider certain issues with respect to liens claimed against the ships of the debtor. The court has considered the argument and representations of counsel for various parties and is of the opinion that a determination of such issues must be made before a plan of reorganization can be prepared by the Trustee and considered by the court. The court has also considered the objection on jurisdictional grounds filed by Arthur H. Shaffer and M. James Spitzer as trustees, and is of the opinion that it is the duty of the court to proceed with the determination of all issues which must be settled before a plan of reorganization can be considered and that the objections to the jurisdiction of this court should be overruled, there being no supersedeas or staying of these proceedings.

WHEREFORE it is ORDERED, ADJUDGED and DECREED as follows:

1. The objections on jurisdictional grounds filed by Arthur H. Shaffer and M. James Spitzer as successor trustees are hereby OVERRULED.

2. That E. A. Bosarge is hereby appointed as Special Master to:

a) Hear and consider the objections filed by the trustee to the claim of Arthur H. Shaffer and M. James Spitzer as successor trustees, and report his findings and recommendations thereon to the court.

b) Determine the liens and the respective amounts thereof, that should be allowed against the ships of the debtor, the TMT Georgia, TMT Carolina, TMT Puerto

Rico, TMT Cuba, TMT Lloyd, that arose prior to the appointment of the trustee herein on November 15, 1957, and determine the priorities among the respective lien claimants with respect to each ship.

c) Recommend what disposition should be made of the claims of Precision Sheet Metal Works and Leathercraft Upholsterers.

d) Determine and recommend what disposition should be made of any other issues that may appear herein with respect to any liens claimed against said ships that arose prior to the appointment of the trustee herein and have been properly filed herein.

e) Determine and recommend the valuations to be placed upon each of the said vessels, other than the TMT Puerto Rico for which a separate fund has been established, for the purpose of finding the total amount of such claims as should be allowed as liens and such addiional amounts as should be allowed as unsecured.

f) Make findings and recommendations to the court with respect to all such issues.

3. The trustee is authorized to pay necessary expenses in connection with depositions and all testimony taken in proceedings before the Special Master.

DONE and ORDERED at Miami, Dade County, Florida, this 6th day of February, 1961.

/s/ EMETT C. CHOATE,
United States District Judge.